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IN THE
SUPREME COURT OF THE UNITED STATES

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN, AS LEGAL GUARDIAN FOR JENNIFER GUILLEN AND ALMA GUILLEN, MINORS; AND MARIANO GUILLEN, AS LEGAL GUARDIAN FOR PAULINA GUILLEN,

Respondents.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF WASHINGTON

BRIEF OF THE STATES OF WASHINGTON, ALASKA, FLORIDA, HAWAII, ILLINOIS, INDIANA, MARYLAND, NEVADA, OHIO, OREGON, PENNSYLVANIA, UTAH, VERMONT, AND THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICI

Washington and the other amici states have two important interests in the issues presented in this case.[1] First, the states have an interest in preserving the federalist structure of the United States Constitution. The Constitution created a Federal Government of limited powers, and states retain substantial sovereign authority. States have a compelling interest in ensuring that the Federal Government does not encroach on state sovereignty by expanding its power beyond that granted by the Constitution. The states also have a substantial interest in preserving the opportunities for federal-state partnerships that exist under the federalist structure of the Constitution.

Second, all of the amici states operate extensive systems of highways and roads—including bridges and railroad crossings The states have a vital interest in improving the safety of these highway facilities to protect their citizens from death and injury. The Federal Government shares this interest. This common interest in highway safety has resulted in a federal-state partnership to improve the nation's highway facilities.

Under 23 U.S.C. §§ 130, 144, and 152 states perform engineering surveys and compile extensive data to identify needed safety improvements to their highway facilities. Based on this information, the Federal Government provides grants to fund these improvements. Another aspect of this federal-state partnership is 23 U.S.C. § 409, which prohibits use of the information collected by the states as evidence that a highway was defective and that the state had notice of the defect. This federal-state partnership has achieved its goals. For example, between 1974 and 1996 the hazard elimination

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[1] This brief is submitted by the Attorneys General of the amici states pursuant to Rule 37.4.

program helped prevent more than 26,500 deaths and 760,000 nonfatal injuries, and the rail-highway crossing program helped prevent more than 8,500 fatalities and 38,900 nonfatal injuries.[2]

Washington and the other amici states participate in this federal-state partnership for highway safety. The decision of the Washington State Supreme Court declaring part of 23 U.S.C. § 409 unconstitutional jeopardizes the partnership by removing liability protection for participating states.

STATEMENT

The Washington Supreme Court's ruling in this case is based on its conclusion that there is no valid federal interest in barring discovery and admissibility of data collected for purposes of the federal highway safety program. In fact, the reason states collect this data is to participate in the federal program. This is demonstrated both by the structure of the program and the history of the federal government's effort to get states to provide the accident information necessary to analyze highway safety.

Under 23 U.S.C. § 152(a) each state "shall conduct and systematically maintain an engineering survey of all public roads to identify hazardous locations . . . and establish and implement a schedule of projects for their improvement".[3] Based on this information, the Secretary of

[2] United States Department of Transportation Federal Highway Administration, *1996 Annual Report On Highway Safety Improvement Programs, Pub. No. FHWA-SA-96-040*, at IV-5 (Apr. 1996). This was the last annual report.

[3] 23 U.S.C. §§ 130 and 144 establish similar programs to eliminate hazards of railway-highway crossings and to replace and rehabilitate bridges

the Department of Transportation may approve projects and pay 90 percent of the cost thereof. 23 U.S.C. § 152(b), (d).

The information compiled under 23 U.S.C. § 152 is required by federal—not state—law. Federal law requires states to precisely locate each accident and sets out the data that the states are required to collect. These federal requirements have developed over the last three decades.

Prior to 1966 there was no federal program for highway safety. In 1946 President Truman called the first President's Highway Safety Conference. The conference produced an action program but responsibility "for implementation was left to the voluntary action of the states. The voluntary action program failed to produce adequate results[.]"[4]

In 1966 Congress enacted the landmark Highway Safety Act of 1966. The Highway Safety Act had two distinct purposes. The first was an action program. 23 U.S.C. § 402 "authorized the establishment of national highway safety standards . . . and required the states to design programs to implement these and a system of federal grants to the states was initiated to help support these programs".[5] The second purpose was to establish a research and development program.[6] 23 U.S.C. § 403 authorized the Secretary of the Department of Transportation to "engage in research on all phases of highway safety and traffic conditions".

[4] United States Department of Transportation National Highway Traffic Safety Administration, *Highway Safety Research, Development, And Demonstration: Conference Proceedings (Final Report)* 3 (Dec. 1979).

[5] *Id.* at 4.

[6] *Id.* at 6.

While Congress was considering the bill that became the Highway Safety Act, the Bureau of Public Roads did a comprehensive study of the elements needed for a new national highway safety capital improvement program. Roy Jorgensen & Assoc., *Evaluation Of Criteria For Safety Improvements On The Highways: A Report To The United States Department of Commerce, Bureau Of Public Roads, Office Of Highway Safety* (1966) (*Jorgensen Report*). The Jorgensen Report set out a detailed plan for identifying hazardous locations on existing roads and for analyzing the effectiveness of proposed improvements. A major part of the report reviewed the suitability of using existing state accident record systems to identify hazardous locations.

The Jorgensen Report concluded "that the existing body of knowledge on accident casual [sic] factors is sadly deficient". Jorgensen Report at 93. Although states kept accident records, they were of little use for highway safety because the records "related primarily to provisions of law requiring maintenance of data for possible legal proceedings or determinations of financial responsibility". *Id.* at 94. In other words, state accident records were collected for limited purposes "not related to the determination of accident causal factors". *Id.* According to the Report, an effective highway records system required "[u]niform, complete and accurate accident reports, stored in one center in every State, subject to rapid retrieval and analysis, and compatible with a national record system at the Federal level". *Id.*

The Jorgensen Report recommended to the Bureau of Public Roads that the Federal Government require each state to develop a comprehensive accident record system. *Id.* at VIII. The report also recommended that accurate and standardized information on accident locations, highway features, accident causation, and injuries would identify hazardous locations needing safety improvements. *Id.* at VII, 102-108.

In 1967 the National Highway Safety Bureau of the United States Department of Transportation (successor to the Bureau of Public Roads) issued sixteen Uniform Standards for State Highway Safety Programs. 33 Fed. Reg. 16337, 16339, Nov. 7, 1968; 33 Fed. Reg. 16560-16564, Nov. 14, 1968. Standards Nos. 9 and 10 required the states to create programs to identify and correct high-accident locations and to create a traffic records system which included accident records containing accident locations, accident "type", description of injuries, description of environmental conditions, and "causes and contributing factors". The requirements of Standards 9 and 10 were closely related to the recommendations of the Jorgensen Report.

The 1967 Standards inaugurated a several decades long effort by the Federal Government to create state accident records, and computerized systems to process them, which contained comprehensive, accurate, and detailed information on accident locations, injuries, causes, and roadway features. A 1971 Department of Transportation report on activities under the Highway Safety Act reported the progress on developing state traffic records systems during the first five years under Standards 9 and 10. One significant problem identified by the report was that "State and local agencies are still inhibited in the use of data exchange because each has had to develop traffic records systems with data elements, codes, formats, and documentation unique to their internal systems. Thus a 'data wall' is created in the interchange of information." United States Department of Transportation National Highway Traffic Safety Administration, *Safety '71, A Report On Activities Under The [1966] Highway Safety Act* 37 (1971) (*Nat'l Safety '71 Report*). To solve this problem, "NHTSA developed reference and guidance documents for both traffic records systems concept and detailed data uniformity"—the

State Traffic Records Systems Design Manual. *Nat'l Safety '71 Report* at 37.

In 1978 the Federal Highway Administration conducted a comprehensive nationwide highway safety review. This review indicated that compliance with the 1967 federal standards remained imperfect. According the report, the "lack of accident data seriously hampered many of the reviews in the 22 States". United States Department of Transportation Federal Highway Administration, *Highway Safety Review: Report Of The Safety Review Task Force To The Federal Highway Administrator* 7 (Dec. 1978) (*Fed. Safety '78 Report*). For example, two states "could only produce a general fatality rate for the sections of roadway under review. No specific information on accident type or location was available." *Fed. Safety '78 Report* at 7. Five other states "provided accident data printouts for the review, but because of either lack of location data or information on collision type, analysis was impossible". *Id.* According to the report, no state "had analyzed the performance of the safety features on their highways using accident data". *Id.*

As time passed, states did make progress in meeting federal standard for accident reports. By 1984, fifty-five states and territories had implemented computerized accident files; by 1988, all states had accident location reference systems for all interstates and state highways, and thirty-one states had such systems for all roads, with the remaining states not having location systems for accidents on local roads. United States Department of Transportation National Highway Traffic Safety Administration, *Highway Safety 1984: A Report On Activities Under The Highway Safety Act Of 1966*, at 9 (1984) (*Nat'l Safety '84 Report*); United States Department of Transportation Federal Highway Administration, *The 1988 Annual Report On Highway Safety Improvement Programs* 18 (Apr. 1988) (*Fed. Safety '88 Report*).

The process for gathering highway safety information became even more important when 23 U.S.C. § 152 was enacted as part of the Highway Safety Act of 1973, Pub. L. No. 93-87 (Aug. 13, 1973). Prior to the Act of 1973, the states used most federal highway construction funds for major construction work, usually on the new interstates and had not been funding many individual safety improvement projects. United States Secretary of Transportation, *Second Annual Report On Highway Safety Improvement Programs, Through June 30, 1975*, at 1 (House Document No. 94-386, 1976) (*Second Annual Report*). But this interstate construction did not address a major highway safety problem because over 90 percent of annual highway fatalities were on non-Interstate routes. *Fed. Safety '78 Report* at 109.

The Act of 1973 responded to the shortcomings of the existing highway safety program by providing federal funding "for the first time exclusively for safety improvements and for improvements off the Federal-aid highway system". *Second Annual Report* at 1. The major reorientation of the federal highway safety programs to funding of specific safety improvements on non-federal roads created a greater need to use accident reports, and analysis of those reports, to determine when improvements should be funded and the priority of those improvements. The Act of 1973 required a state records system that would enable "retrieval of accident data by location, by highway data, by type of accident, or other characteristic". *Second Annual Report* at 34. The implementing regulations for the Act of 1973 specifically required that states plan highway safety improvements "on the basis of accident experience or accident potential" and that states collect and maintain a record of highway accident data. 23 C.F.R. 924.9(a)(2), (1).

The Highway Safety Act of 1973 created an immediate tort liability problem for the states. The federal requirement that the states have accident reports which were

accurately location-coded to state and local roads and which contained detailed highway, accident causation, and injury data lead to claims of state liability for roads which had not been improved. The *Second Annual Report* on the Act of 1973 noted the serious problem caused for the states by using accident reports to create a system to identify publicly "hazardous locations" on older state and local roads.

> "A few States are very concerned about the confidentiality of identified high-hazard locations because of legal actions resulting from accidents at these locations before an improvement can be made. A few States expressed strong objection to the Federal Highway Administration's releasing their last year's annual report which listed high-hazard locations. The public has access to the States' reports under the Freedom of Information Act." *Second Annual Report* at 36.

The state tort liability problem created by the Act of 1973 was ameliorated by the enactment of 23 U.S.C. § 409 in 1987, which now provides as follows:

> "Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled *or collected* for the purpose of identifying evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists or data." 23 U.S.C. § 409 (emphasis added[‡]).

[‡]In 1995 the words "or collected" were added to § 409.

This case illustrates how § 409 was intended to operate. In 1995 and 1996, Pierce County applied for federal funds to make major safety improvements to an existing intersection. Joint Appendix (JA) J (Third Declaration of Thomas Ballard, County Engineer). The county sought up to $180,000 in federal funds from the federal hazard elimination program created by 23 U.S.C. § 152, part of the Highway Safety Act of 1973. JA G (Declaration of Wayne Gruen, Deputy Assistant Secretary, Washington State Department of Transportation). The purpose of the funds was to make capital improvements to 0.66 miles of county road including installation of "a fully actuated traffic signal" and "concrete barrier curb-gutter and sidewalk at the four corners of the intersection". *Id.* The application for federal safety improvement funds required the county to collect reports of prior accidents at the intersection, to analyze them, and to provide an accident history sufficient to support the design of the improvement and the request for federal funding. JA J.

While the county's funding application was pending, respondent Ignacio Guillen's spouse caused a major accident at the intersection, resulting in her death and claims by her surviving husband and several children who were in the vehicle. JA J. After approval of the county's application for § 152 funds, Guillen filed a tort suit against the county claiming that the county "owed a duty to the plaintiffs to have a [sic] traffic control at the intersection". JA C. Guillen made public record requests and discovery requests to the county for the analyses, accident history, and accident reports which had been used to make the application for federal safety improvement funds. JA A, H. The county denied the public records and discovery requests under § 409 because

the documents had been collected and created by the county for purposes of obtaining federal highway safety improvement funds. JA B, K.

SUMMARY OF ARGUMENT

The federal highway safety program—including § 409—is a valid exercise of Congress' power under the Spending Clause of the United States Constitution. States collect highway safety data required by the federal government and, in return, the federal government pays for local highway improvements. The program is designed to fix the most dangerous road hazards first, so accurate data and candid assessments of local road hazards are critical to the success of the program.

The Washington Supreme Court held that extending § 409 to data "collected" under the federal highway safety program does not bear a reasonable relationship to the purpose of the federal spending. This conclusion is mistaken. Section 409 is a critical part of the program because it eliminates the use of the data in tort actions against the state. Without § 409, states would be less candid—and might even choose not to participate in the program. The reason is that highway safety data is extremely damaging to a state in a tort action. This is so for two reasons. First, it can be used to show that the state had notice of a defect and did not correct it. Second, the information may have the effect of actually expanding state tort liability. As a rule, state law limits liability for failure to improve or reconstruct old roads. Courts recognize that it is not fiscally possible for a state to improve all its old roads. This can change if a plaintiff can point to a specific section of road that the state, itself, has identified as hazardous. Section 409 is related to the federal interest because it eliminates the disincentive to provide accurate data and candid evaluations.

The Washington Supreme Court held that there was no valid federal interest because it concluded that § 409 applied to data originally collected for state and local purposes. This holding is based on a false assumption—that accident data was originally collected for state and local purposes. In fact, the only reason states collect highway safety data is to participate in the federal highway safety program. There was never an independent state or local purpose. The Washington Supreme Court's error on this point destroys the basis for its holding that § 409 is not reasonably related to a valid federal purpose.

Section 409 is also limited in its scope. It applies only to discovery or admissibility of data in an action for damages arising from any occurrence at a location mentioned in the reports and data. Section 409 does not prohibit discovery or use of the information for another purpose. In addition, § 409 does not limit a plaintiff's ability to present other relevant evidence that was not collected for purposes of the highway improvement program.

ARGUMENT

The Washington Supreme Court ruled that the 1995 amendment to § 409 was beyond the power delegated to Congress by the United States Constitution. It is true that the "Constitution created a Federal Government of limited powers". *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). However, in this case the federal highway safety program—including § 409—falls easily within Congress' spending power. The Washington Supreme Court's decision striking down § 409 is based on a false premise—that highway safety data is collected for an independent state purpose. In fact, prior to the federal highway safety program, states collected little or no accident data. The data collected today is required by federal law.

1. Congress Had The Power To Enact § 409 Under The Spending Clause

The Constitution empowers Congress to "lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the Common Defence and general Welfare of the United States". Const. art. I., § 8, cl.1. Congress' power under the spending clause is subject to four restrictions. First, "the exercise of the spending power must be in pursuit of 'the general welfare.'" *South Dakota v. Dole*, 483 U.S. 203, 207 (1987). Second, if "Congress desires to condition the States' receipt of federal funds, it must do so unambiguously, enabling the States to exercise their choice knowingly, cognizant of the consequences of their participation". *Id.* Third, any conditions on federal grants must "bear some relationship to the purpose of the federal spending". *New York v. United States*, 505 U.S. 144, 167 (1992). Finally, "other constitutional provisions may provide an independent bar to the conditional grant of federal funds". *Dole*, 483 U.S. at 208.

The federal highway safety program—including § 409—does not violate any of these restrictions. Federal spending for highway safety promotes the general welfare and the provisions in 23 U.S.C. §§ 152 and 409 unambiguously set out Congress' conditions for receipt of the funds. Moreover, there is no independent constitutional bar to imposing conditions on federal dollars for the highway safety program.

The Washington Supreme Court held that extending § 409 to data "collected" under 23 U.S.C. § 152 did not bear a reasonable relationship to the purpose of the federal spending. This conclusion is mistaken.

Under 23 U.S.C. § 152, states provide information required by the Federal Government identifying hazardous roads. In return, the Federal Government helps pay to

improve the roads. For the program to work, it is vital that states participate and that they provide accurate information. Section 409 is directly related to this purpose. Although this Court has not considered the purpose of § 409, lower federal and state courts agree that it is designed to "facilitate candor in administrative evaluations of highway safety hazards" and "prohibit federally required record-keeping from being used as a tool in private litigation". *Robertson v. Union Pacific R.R. Co.*, 954 F.2d 1433, 1435 (8th Cir. 1992). *See also Harrison v. Burlington Northern R.R. Co.*, 965 F.2d 155, 160 (7th Cir. 1992); *Palacios v. Louisiana & Delta R.R. Inc.*, 740 So. 2d 95, 98 (La. 1999); *Duncan v. Union Pacific R.R. Co.*, 790 P.2d 595, 597 (Utah Ct. App. 1990); *Light v. New York*, 560 N.Y.S.2d 962, 149 Misc. 2d 75, 79-80 (Ct. Cl. 1990).

Allowing the collection of federally required data to be used against a state or local government would undercut candor and perhaps even participation. This case is a good example. Pierce County sought $180,000 to make improvements on 0.66 miles of county road. JA G. Based on the information the county developed to support its request for federal funds, respondent now seeks damages which could involve millions of dollars. Without the protection of § 409, state and local governments might be more concerned with future lawsuits than with providing accurate detailed information to the Federal Government.

Section 409 protects state participation and candor by eliminating the use of data collected for federal purposes in tort actions against the state. Section 409 does this in two ways.

First, the collection of data for accidents at specific locations might be very damaging to a state defendant in a tort action because it can be used to show that the state had notice of the defect. A leading plaintiff's treatise on highway

liability, *Kuhlman's Killer Roads From Crash to Verdict* explains:

> "One of the crucial disputed issues in virtually every crash case, under case law or statute, is whether the defendant had sufficient notice of the defect at issue before the plaintiff's crash to be held liable for a lapse in due care for not making timely corrections that would, more probably than not, have prevented the plaintiff's injuries. Without this notice, defendants can use the chronological defense, cited earlier, that it would go bankrupt if it were required to constantly upgrade all of its road miles or crossings." William E. Kenworthy, *Kuhlman's Killer Roads From Crash to Verdict* 149 (2d ed. 1999).

Kenworthy also counsels that highway authorities should be reviewing highway accident data and that such data provides notice of a hazard to be remedied, citing to several of the Federal Highway Administration directives and publications which established the highway improvement programs after the Highway Safety Acts of 1966 and 1973. Kenworthy at 161-62, 176-78.

The use of accident histories and records in tort litigation to establish the critical element of notice of a highway hazard also explains the importance of the 1995 amendment to § 409. Several state cases before 1995 had held that § 409 protected analyses and safety studies done by highway agencies but not the disclosure of the "raw data" (mostly accident histories and reports) collected to prepare those analyses and reports. *See Wiedeman v. Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993) (accident reports); *Tardy v. Norfolk Southern Corp.*, 659 N.E.2d 817 (Ohio Ct. App. 1995) (accident reports); *Southern Pacific Transp. Co. v. Yarnell*, 890 P.2d 611 (Ariz. 1995) (location

review and safety upgrade plan for rail crossings). Congress amended § 409 to protect this raw data.

The purpose of the amendment to § 409 was to "clarify that *data 'collected' for safety reports or surveys* shall not be subject to discovery or admitted into evidence in Federal or State court proceedings. H.R. Rep. 104-246 § 328, at 59 (1995) (emphasis added); *see* Act of Nov. 28, 1995, Pub. L. No. 104-59, 1995 U.S.C.C.A.N. (109 Stat.) 591." *Guillen v. Pierce County*, 144 Wash. 2d 696, 723, 31 P.3d 628 (2001).

> "*This clarification is included in response to recent State court interpretations of the term 'data compiled' in the current section 409 of title 23.* It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such data." *Guillen*, 144 Wash. 2d at 723.

Thus, a major effect of the 1995 amendment was to protect highway agencies from claims that their collection of accident reports and other safety-related data put them on notice of hazardous conditions which required correction.

There is a second way in which § 409 protects states from the adverse impact of collecting highway safety information. If the information was used, it would have the effect of expanding state tort liability. Under Washington law, highway authorities are generally not liable if they cannot make improvements to all older highway facilities that could be made safer by capital improvements. There is no duty for "a county to update every road and roadway structure to present-day standards". *Ruff v. County of King*, 887 P.2d 886 (Wash. 1995) (installing guardrail on older

road); *McCluskey v. Handoff-Sherman*, 882 P.2d 157 (Wash. 1994) (installing median barrier on older road); *Tanguma v. Yakima County*, 569 P.2d 1225 (Wash. Ct. App. 1977) (repiacing old narrow bridge). The law in most states is similar to Washington. *See generally* 4 Transportation Research Board, National Research Council, *Selected Studies In Highway Law, Liability For Failure To Comply With Guidelines* 1966-N24 to 1966-N29 (Ross D. Netherton ed. 1991).

State law limits liability for failure to improve or reconstruct older facilities because, as the Utah Court of Appeals observed, highway "maintenance and improvement are predominantly fiscal matters. Every highway could probably be made safer by further expenditures, but we will not hold UDOT (and implicitly, the legislature) negligent for having to strike a difficult balance between the need for greater safety and the burden of funding improvements." *Duncan*, 790 P.2d at 601. Kenworthy, in *Kuhlman's Killer Roads*, also recognizes that under traditional state law, it is difficult for plaintiffs to prevail in cases where the plaintiff's theory is not that the road was negligently designed, signed, or maintained, but that the road should have been improved to a newer and safer standard.

> "A defendant charged with negligently designing, building, or maintaining a transportation facility can generally argue, with a great deal of support, that in order to meet its particular burden of reasonable care, it need only satisfy the design and safety criteria, if any, existing in the distant past when the facility was created. . . .
>
> ". . . .
>
> "These defense arguments, bolstered by common sense and authoritative literature, are obviously very powerful. Judges and juries are not likely to hold a defendant to a standard of care that would inevitably force it into bankruptcy and ruin, and the inescapable fact is that few defendants could afford to upgrade all their facilities to current safety levels." Kenworthy, at 7-8.

According to Kenworthy, for plaintiff to prevail he or she "must show that prior to plaintiff's accident, the particular facility involved in his case should have been upgraded to meet a higher standard of care that would have prevented the crash". *Id.* at 9. To make this case, Kenworthy counsels that the "plaintiff must gather all the available evidence of prior crashes, complaining letters, recommendations for improvement, applicable safety statutes, governmental warnings, crash rates, death rates, and anything else establishing that the dangers of this particular facility should have been 'red flagged' to the defendant before the plaintiff was injured". *Id.* The purpose of this evidence is to single out the location of the plaintiff's accident.

> "If the fact finder accepts this singling out of the facility at issue, the defendant will lose much of the 'common sense' force behind its argument that it would be financially destroyed if required to constantly upgrade all of its facilities after they are built. *The same evidence establishing that the defendant should have upgraded this particular dangerous facility, of course, will then simultaneously establish that the defendant was negligent in not making such improvements and also that the defendant's negligence should be measured against the design and safety standards existing at the time the defendant should have upgraded the facility.*" Kenworthy at 9-10.

Kenworthy specifically refers to the accident record-keeping requirements of the federal highway safety programs as one of the best ways for a plaintiff to create a duty for state and local government to make capital improvements to older roads. Kenworthy at 8, 161-62, 176-78.

The federal Highway Safety Acts expanded state liability because they created a comprehensive system to identify sections of existing roads for safety-related capital improvements. The detailed accident reports and computerized accident report systems required by the federal acts have had the effect of giving continuous notice to highway authorities of "hazardous" or "defective" roads and, as noted in the excerpt from Kenworthy, the notice of a hazard on a road creates the implication of a duty to improve the facility to a newer and safer design. Thus, one of the results of the Highway Safety Acts has been to assist plaintiffs in avoiding common state tort defenses which limit liability for failure to improve or reconstruct, as distinguished from repair or maintain, capital facilities.

The § 409 privilege for accident reports, and other "raw" safety data collected to implement the Highway Safety Acts, does not interfere with traditional state tort liabilities for design, maintenance, and signing of highways. Instead, § 409 prevents the requirements of the Highway Safety Acts from being used to create or expand state liability for alleged lack of capital safety improvements on older roads.

2. The Washington Supreme Court Based Its Decision On A False Premise—That Highway Safety Data Is Collected For An Independent State Purpose

The Washington Supreme Court ruled that the 1995 amendment to § 409 violated the spending clause. *Guillen*, 144 Wash. 2d at 734-37. The court concluded that there was no valid federal interest in barring discovery and

admissibility in state court "of accident reports and other traffic and accident materials and 'raw data' that *were originally prepared for routine state and local purposes,* simply because they are 'collected' for, among other reasons, federal purposes pursuant to a federal statute". *Guillen*, 144 Wash. 2d at 737 (emphasis added).

The holding of the Washington Supreme Court rests on its assumption that accident materials and raw data were originally prepared for "routine state and local purposes". *Id.* This assumption is wrong. Accident materials and raw data were not collected for routine state and local purposes. They were collected to comply with federal requirements in the highway safety program.

The origin of the current use of accident reports in highway safety programs is evident from an examination of federal regulations and various Congressional reports and administrative materials related to the development of the federal program for improvements to older highways.

Before the Highway Safety Act of 1966, state accident reports were not related to highway safety but were used for a variety of non-highway uses, such as financial responsibility. Moreover, these records were not kept in statewide databases but were kept by various agencies for their specific purposes. As a result of the Highway Safety Act of 1966, states were required to perform detailed coding of accident reports by location, highway features, accident causes, and injuries. The Act of 1966 also required the states to put the accident records in comprehensive computerized databases so the records could be sorted by location, highway features, and accident causes.

The Highway Safety Program Standards issued by the National Highway Safety Bureau in 1967 required states to have programs which used the new highway information in accident reports and the new databases to identify and correct

"high accident locations". The Highway Safety Act of 1973 advanced the federal safety program further by requiring each state to have a specific highway safety program to make safety improvements to existing roads. The Act of 1973 and its implementing regulations required that the funding and priority of state highway improvements be driven by location, accident, and highway feature data derived from the federally-mandated accident record databases. In 1984, Congress added 23 U.S.C. § 402(k)(1) which provided specific funding for states to establish and maintain "comprehensive computerized safety recordkeeping system[s] designed to correlate data regarding traffic accidents, drivers, motor vehicles and roadways". The state accident data collection and analysis which is required for each state's Highway Safety Improvement Program is also federally funded. *See Coniker v. New York*, 695 N.Y.S.2d 492, 181 Misc. 2d 801 (Ct. Cl. 1999).

The Washington Supreme Court overlooked Washington law that provides that all accident reports for county roads must be processed under the requirements of the federal Highway Safety Act of 1966. The Washington County Road Administration Board adopted administrative rules in 1968 which provide, in part, as follows:

> "In order to implement the requirement of the National Highway Safety Act of 1966 that requires all states, in cooperation with their various local governments, to collect, compile and make reports to the National Highway Safety Bureau of Accident Statistics in each state [Washington State Patrol], the county road administration board has acted to coordinate the activities of the county engineers and the state patrol. Each county engineer is to cooperate in this effort by following the procedure outlined below." Wash. Admin. Code § 136-28-010.

The Board's rules provide that county road engineers must analyze and code all county road accident reports for the records section of the State Patrol which has maintained[7] the accident database required by the Act of 1966. *See* Wash. Admin. Code §§ 136-28-020, -030.

The utility of accident reports in tort litigation against highway authorities derives from the coding and computerization of accident reports for federal highway safety purposes. The public records and discovery requests in this case were for the computerized list of accidents for a particular location on a Pierce County roadway and for copies of all the accident reports which appeared on that list. This information is available only because the federal highway safety acts required the states to use accident reports with detailed location and highway feature coding and maintain them in comprehensive computer databases so that hazardous highway locations could be identified.

The Washington Supreme Court failed to examine the nature of the current accident report system and simply assumed that accident data was collected for state and local purposes. This assumption is wrong, and the court's error destroys the basis for its conclusion that the 1995 amendment to § 409 is not reasonably related to a valid federal purpose.

3. Section 409 Is Limited To Achieving The Federal Purpose

The Washington Supreme Court incorrectly assumed that accident data is collected for state and local purposes and was troubled by its belief that the 1995 amendment to § 409 "effectively creates a legal black hole into which state and local governments can drop virtually all accident materials and facts". *Guillen*, 144 Wash. 2d at 724. The court's

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[7] This function has subsequently been transferred to the Washington State Department of Transportation.

concern about the scope of § 409 is misplaced. Section 409 prohibits the use of certain information for certain purposes.

In the first place, § 409 prohibits only discovery or admissibility "in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data". Thus, the purpose of § 409 is limited. For example, Washington has a broad public disclosure law, Wash. Rev. Code § 42.17.270. Section 409 would not prohibit a newspaper in Washington from requesting highway data to do a story on the highway safety. However, § 409 would prohibit a plaintiff from using the newspaper story based on the highway data in a damages action. *See Robertson*, 954 F.2d at 1435 ("Appellants are not entitled to introduce evidence of otherwise inadmissible data simply because it is reported by an indirect, secondary source.").

In addition, § 409 applies only to reports and data collected "pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds". While § 409 does protect accident reports due to their critical role in the highway safety program, this does not prevent litigating tort cases without use of that data. Under state law, accident reports are generally inadmissible as hearsay. *Kenworthy*, at 261-67. The reports sometimes can have an indirect use, such as refreshing the recollection of a witness, but the usual evidence in an accident case is testimony from witnesses. *Id.*

Section 409 does not prevent a plaintiff from presenting a normal tort liability case through the testimony of parties, witnesses, investigating officers, and engineering experts, and through evidence of highway design or signing standards. *See Palacios*, 740 So. 2d at 102 ("The plaintiff is at liberty to investigate, examine and present other relevant

evidence, so long as such evidence was not compiled or collected for purposes of federal highway improvement programs."); *Robertson*, 954 F.2d at 1435 ("the expert witness was able to form an opinion and testify in court, without relying upon any data provided by the AHD").

In this case, respondents seek to use accident reports because "by gathering evidence about numerous accidents occurring at this intersection, plaintiffs are trying to establish that the county had notice of the hazardous condition and failed to make improvements". *See* Pl.'s Mem. Compel at 14. This is the use which is made of accident reports in tort litigation, and it is a use arising from the role that accident reports play in the highway safety program. *See* Kenworthy at 161-62, 176-78.

Thus, § 409 is not a "black hole" in which states can hide information. Instead, it is a law that facilitates the federal highway safety program by eliminating the disadvantage to states that provide accurate, candid information about road hazards so roads can be improved to reduce those hazards.

CONCLUSION

The decision of the Washington Supreme Court should be reversed.

Respectfully submitted,

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